



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Scofield
Respondent: Mr M Tolley
Heard at: East London Hearing Centre
On: 31 July 2017
Before: Employment Judge Russell

Written Representation

Claimant: Mr Mark Andrew (Friend)
Respondent: Ms K Reece (Senior Litigation Consultant)

JUDGMENT

It is the judgment of the Employment Tribunal that:-

1. The compensatory award shall be reduced by 70% to reflect the extent to which the Claimant's conduct contributed to the dismissal, pursuant to s.123(6) ERA 1996.
2. The compensatory award which the Respondent must pay to the Claimant is therefore £105.98.

REASONS

1. By a Judgment sent to the parties on 5 July 2016, the Tribunal found that: (1) the reason for dismissal was some other substantial reason; (2) the Claimant had been unfairly dismissed as the Respondent did not follow a fair procedure; (3) employment would have terminated fairly in a week in any event. The Respondent was ordered to pay a basic award of £4,200 and a compensatory award of £353.27 (one week's net pay).

2. The Respondent appealed against that Judgment on three grounds, two of which were permitted to proceed to a full hearing, namely: (1) the ET should not have found the dismissal to have been unfair when the procedural failing it had identified would have made no difference to the decision, which was substantively fair; and (2) having found that the Claimant's conduct - specifically in contending that other team

members had colluded to fabricate statements against her - was potentially relevant to her dismissal, the ET ought to have considered reducing the compensatory award under section 123(6) ERA.

3. Following a hearing before HHJ Eady QC on 15 March 2017, the second basis of the appeal succeeded and the issue of contributory fault reduction on the compensatory award has been remitted. In remitting the issue, HHJ Eady QC read the conclusions of the original Judgment as possible findings of culpable behaviour and facts which were such that a finding of contributory fault might appropriately have been made. The specific points to be decided are whether the Tribunal did find that there was contributory fault meriting a deduction and, if so, of how much.

4. The Respondent confirmed to HHJ Eady QC that it did not seek a reduction of the basic award which remains due and payable. Given the relatively small sums involved, and with the agreement of the parties, the remitted issue has been dealt with on paper rather than an attended hearing.

5. Mr Andrew set out his submissions in an email sent on 2 July 2017. In summary, he relied upon the documents before the Tribunal on the last occasion to submit that Mrs Tolley did not take into account comments made by the Claimant's representative when reaching her decision to dismiss and/or that other primary evidence showed that the relationship between colleagues had not broken down. In short, that the decision to dismiss was never based on any comments made at the disciplinary hearing such that her conduct had no influence or contribution upon dismissal.

6. Ms Reece set out her submissions in an email sent on 7 July 2017. In summary, she relied upon the findings of fact and conclusions set out in the original Judgment at paragraphs 16, 19, 22 and 28 to 30 in support of her submission that conduct of the Claimant in advancing the defence which she had was a very significant factor in the decision to dismiss. By authorising, whether explicitly or by omission, Mr Andrew to advance such a defence, the Claimant's conduct was culpable or blameworthy as it "*effectively put the nails in the Claimant's coffin*".

7. The legal principles to be applied to such a reduction were identified at paragraphs 13 to 17 of the Eady Judgment. Section 123(6) ERA provides that:

Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

8. This requires a finding of a causative relationship between the conduct and the dismissal, although the use of the word "contributed" makes plain that the employee's conduct need only be a factor in the dismissal; it need not be the direct and sole cause. The focus required by section 123(6) must be on what the employee did: the employer's decision and conduct is relevant to the ET's assessment of fairness, but the issue of contributory fault requires an assessment by the ET of the employee's conduct. Moreover, the question of causation or contribution relates to the dismissal, not the unfairness of the dismissal. This is so even where the reason for dismissal is not conduct, but as here some other reason.

Conclusions

9. In light of the contents of paragraph 27 of the EAT Judgment remitting this issue, I consider that it is appropriate to determine the issue of contributory fault by reference to the findings of fact already made in the liability judgment. To this extent, I prefer the submissions of Ms Reece to those of Mr Andrew.

10. As I found at paragraph 14, the original reason for inviting the Claimant to a formal meeting was concern about the care being provided by her to Mr Tolley. However, as found in paragraphs 15 to 19, the meeting was dominated by Mr Andrew whose approach was to attack the credibility of those colleagues who had provided statements to Mrs Tolley. Mrs Tolley then obtained the further statements from the colleagues which, I concluded unfairly, were not provided to the Claimant. As for the reason why Mrs Tolley reached the decision to dismiss, paragraph 21 makes clear that Mrs Tolley considered the statements when determining the effect upon Mr Tolley if staff were at loggerheads and might leave. Paragraph 21 also refers to Mrs Tolley's concern that the Claimant's conduct was affecting staff ability to work together. The point is found again in paragraph 22: Mrs Tolley's letter of dismissal referred to the Claimant's defence and a belief that a solution would not be possible. I went on to find that this was a reference to the fact that the Claimant's defence was to accuse her colleagues of lying or exaggeration and her belief that the relationship between the team had broken down.

11. The reason for dismissal was some other substantial reason, in relation to Mrs Tolley's belief that she could not trust or have confidence in the Claimant's ability to look after Mr Tolley. The reference in paragraph 27 of my conclusions to the paramount importance of the personal assistants working as one team encompasses Mrs Tolley's concerns about the relationship between colleagues. This is reinforced at paragraph 29 with the conclusion that Mrs Tolley was entitled to take into account and attach significant weight to the Claimant's conduct of her defence, through Mr Andrew.

12. Having regard to the liability Judgment, I am satisfied that the conduct of Mr Andrew in advancing the Claimant's defence as he did was at the very least foolish conduct and was blameworthy in the circumstances of the case. Where the employment concerns the need to provide personal care to a severely disabled person, as here, it is obvious that the carers must enjoy a professional and respectful working relationship. It is one thing to raise legitimate concerns about a colleague's standard of care provision but quite another to accuse one's colleagues of malice, disloyalty, dishonesty and untrustworthiness. The Claimant chose to do the latter and that was, in my conclusion, conduct of sufficient character to require a reduction if it caused or contributed to the dismissal.

13. In light of my findings of fact, set out above, I accept Ms Reece's submissions that the Claimant's conduct did contribute to her dismissal even if it were not the sole reason for the same. Paragraph 22 makes the point clear. If contributory fault had been an issue addressed at the liability hearing, which it regrettably was not, then I would have found that the Claimant did contribute to her own dismissal by reason of the case put forward at the formal hearing. I reach that conclusion now on the remitted issue.

14. As for the amount of the contribution, I do not accept that it was 100%. The concern about the standard of the Claimant's care to Mr Tolley was very important to Mrs Tolley and the Claimant might well have been dismissed for this alone. The nature of the defence however removed any chance that Mrs Tolley might settle on a sanction short of dismissal and reinforced her conclusion that the relationship had broken down. In the circumstances, I consider that the intemperate nature of the Claimant's response to the original care concerns was a substantial cause of the belief that the relationship had broken down and, hence, the dismissal. The appropriate reduction to the compensatory award is 70%, making the compensatory award **£105.98**.

Employment Judge Russell

1 August 2017